



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Establish the)
California Institute for Climate Solutions.)
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R.07-09-008

MORRISON & FOERSTER LLP'S RESPONSE TO COMMENTS

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In accordance with the schedule established by Administrative Law Judge Brown in her October 10, 2007 Ruling, Morrison & Foerster LLP hereby submits its Response to Comments in the above-referenced rulemaking.

Twenty-two (22) parties submitted opening comments in this proceeding of the Public Utilities Commission of the State of California (the “Commission”).¹ A substantial majority of those parties enthusiastically support funding from electric and gas ratepayers to establish the California Institute for Climate Solutions (“CICS” or “Institute”). In addition, since the filing of UC’s original proposal, the six (6) major academic institutions in California – UC, the California State University System, Stanford, Caltech, USC and the California Community College System - have worked collaboratively to develop an agreed framework for CICS and, as a result, UC has submitted a refined proposal supported by all of such institutions. Morrison & Foerster commends UC and the State’s public and private academic institutions for expeditiously working together to develop a framework and program that will allow the world-class climate change experts that are part of these respective institutions to work together toward a common goal.

¹ The comments generally can be segregated into five major groupings: (1) academic institutions, including University of California (“UC”); California State University System (“CSU”), Stanford University (“Stanford”), California Institute of Technology (“Caltech”) and University of Southern California (“USC”); (2) investor-owned utilities, including Pacific Gas and Electric Company, Southern California Edison Company (“SCE”), San Diego Gas and Electric Company and PacifiCorp; (3) environmental and scientific entities, including Natural Resources Defense Council (“NRDC”), Environmental Defense, California Council on Science and Technology (“CCST”) and Community Environmental Council (“CEC”); (4) Customer Groups, including the Division of Ratepayer Advocates (“DRA”), Greenlining Institute, Consumer Federation of California (“CFC”), The Utility Reform Network (“TURN”), Southern California Generation Coalition (“SCGC”), California State Farm Bureau, and the Energy Producers and Users Coalition, Indicated Producers and Western States Petroleum Association and the Independent Energy Producers Association.

Such cooperation will propel California into a leadership role in confronting and resolving the potentially dire environmental and economic consequences of climate change.

While the vast majority of the comments support some form of ratepayer funding for CICS, this is not to say that the endorsement is unequivocal or without suggested changes and modifications. Morrison & Foerster will address some of the comments and suggested changes below in this Response to Comments.

While a handful of parties oppose the proposal, these parties focus on the potential rate impacts. Morrison & Foerster is acutely aware that energy rates in California are among the highest in the nation. That being said, however, we also recognize that climate change represents a significant threat to the environment and the lives of future generations. The monetary consequences of climate change dwarf the cost of this innovative proposal. Electric generation is directly responsible for approximately twenty percent of the greenhouse gas (“GHG”) emissions that are causing global warming. It is incumbent upon those that have contributed to this environmental degradation by receiving the output from fossil-fueled electric generating plants to find the solutions to the problem. Taking a theme from the 1960’s civil rights movement, *if you are not part of the solution, you are part of the problem.*

RESPONSE TO COMMENTS

A. Ratepayer Funding for CICS is Appropriate and Consistent with Legal Requirements

TURN, DRA and CFC claim that the proposal to have electric and natural gas ratepayers pay for research for CICS and research for solutions to climate change conditions is an inappropriate use of ratepayer funds. They claim that the Legislature, not the Commission, should be the one to decide whether such research should be funded.² The opponents’ arguments overlook that there is a direct and material nexus between electric customers’ requirements, which have historically been satisfied at least in part by fossil-fired generating plants, and climate change conditions.³ Similarly, on the natural gas side, gas customers’ usage contributes to GHG emissions. In other words, one of the true costs of being a consumer of electricity generated by fossil fuels or being a natural gas customer is the resulting impact on the

² TURN at 2; DRA at 4; CFC at 2.

³ Emissions from the electric generation sector account for approximately 20% of all Greenhouse Gas emissions. See California Air Resources Board, Greenhouse Gas Inventory, *available at* http://www.arb.ca.gov/cc/ccei/inventory/tables/ghg_inventory_by_ipcc_2007-08.xls (10/30/07)

environment. Therefore, it is appropriate for the Commission to conclude that ratepayers should help pay for the costs to mitigate or clean-up these resulting impacts. The Commission does not need the Legislature's blessing to authorize such funding. The proposed surcharge that would be used to fund CICS is not a tax, but is a charge that is directly related to the cost of electric or natural gas service. It is appropriate that the Commission reflect in rates the costs associated with determining how best to mitigate, reduce or clean up the environmental impacts that directly result from receiving electric and natural gas service.

The Commission has taken similar costs into account in the past. Thus, electric utilities have been allowed to increase rates to clean up generating sites, such as fuel oil storage facilities and nuclear plant decommissioning. Further, rates charged by natural gas companies have included the costs of cleaning up manufactured gas sites. It is appropriate and consistent with prior Commission practice that electric and gas ratepayers help fund the research for a solution to the much more drastic environmental consequences that result from using fossil fuels for electric generation and natural gas service.

DRA claims that it is inappropriate for ratepayers to fund an academic institution.⁴ CFC goes as far as to suggest it would be illegal.⁵ We believe that both are wrong. DRA's argument overlooks that this is not intended as general funding for a university, but is earmarked for a specific purpose that is directly related to consumption of electricity and natural gas by California ratepayers. DRA's argument overlooks that some of the world's foremost experts on climate change reside in California's public and private academic and research institutions. It would be foolish not to draw upon this expertise simply because it is located in an academic institution. Ratepayers have a long history of helping to fund research, whether it be through the Electric Power Research Institution, the Gas Institute, or the Public Interest Energy Research program ("PIER"). The fact that the most exceptionally qualified experts associated with climate change reside in the State's universities and research institutions should not present a barrier to ratepayers' contributions to fund this important research.

CFC claims that ratepayer funding for CICS would be illegal. In support of this proposition it relies on the California Supreme Court's decision in *Pacific Tel. & Tel. Co. v. Public Util. Com.* 62 Cal.2d 634 (1965).⁶ The case, however, is not applicable to the present

⁴ DRA at 2.

⁵ CFC at 15.

⁶ *Id.*

situation. The contributions in the *Pacific Tel. & Tel.* case were charitable donations and were not intended to reimburse the colleges and university for a specific activity that was utility and ratepayer related. The Supreme Court concluded that it was inappropriate for utilities to have ratepayers fund a utility's dues, donations and contributions. The proposed ratepayer funding for CICS however is not in the nature of dues, donation or a charitable contribution. It is funding for a proposed entity which will marshal the expertise that exists in the State's public and private academic and research institutions. The research program is tailored to an environmental problem that is both directly and indirectly related to consumption by electric and natural gas ratepayers.

CFC further contends that the Commission's ratemaking authority is limited.⁷ In support of this proposition, it relies on *Southern Cal. Gas Co. v. Public Utilities Com.* 24 Cal.3d 653 (1979). Again, the case is inapposite. Contrary to CFC's assertion, there is no indication that the legislature has sought to preempt the area of climate change and to occupy the entire area.⁸ Unlike the *Southern California Gas Co.* case, this is not a case where the doctrine of *expression unius est exclusion alterius* is applicable. The Legislature has not attempted to direct the Commission in such a way that would preclude the Commission from acting on its own. Rather, the action proposed by the Commission is "cognate and germane to the regulation of public utilities." Electric and gas utilities contribute substantially to GHG emissions and global warming. Determining how best to reduce, mitigate or clean-up those GHG emissions is properly viewed as a cost of providing utility service. Ratepayer funding for CICS meets the test for proper inclusion in utility rates. The rate surcharge used to fund CICS is for a purpose that is "cognate and germane to the regulation of public utilities."

B. Funding for CICS Should not be Limited to Investor-Owned Utility Ratepayers

A number of parties state that funding for CICS should not be limited to ratepayers of investor-owned utilities. Morrison & Foerster agrees. Climate change issues that are related to electric utilities and natural gas companies span both investor-owned and publicly-owned utilities. Morrison & Foerster urges the Commission to try to expand funding for CICS to include not only publicly-owned utilities but also possibly the private sector. The Commission should request that publicly owned utilities voluntarily pay their share for the funding of this

⁷ *Id.*

⁸ *Id.* at 13, 16.

important research. Alternatively, the Commission should sponsor legislation that would include publicly-owned utilities in this effort. Except for customers that are purchasing all of their electric requirements from a green portfolio, this surcharge should be non-bypassable. The Commission should also consider requesting that private parties in the State, including venture capital firms, financial institutions and membership-based organizations like E2, make donations or otherwise partner with CICS.

We agree that the surcharge should only be levied once. Natural gas sales for electric generation *should not* be surcharged, so long as the sale of the electricity generated is subject to the surcharge. On the other hand, if the electric generation is not subject to the surcharge, such as might occur if a publicly-owned electric utility refused to participate in the program and pay its fair share, then the sale of the natural gas that is used for electric generation *should* bear its share of the cost of funding CICS. Furthermore, these costs should not be recovered through the public purpose charge as SCGC recommends.⁹ It is a separate and distinct surcharge.

Finally, we agree that the surcharge should be levied on an equal cents per kWh or therm basis. GHG emissions are a function of the amount of electricity generated to meet electric requirements. In other words, the amount of GHG derives directly from the number of units generated to meet customers' requirements. As a result, it is appropriate to levy the surcharge on an equal cents per kWh or therm basis.

C. CICS Should Allocate 12% to 15% of its Budget to Administration

In its OIR, the Commission requested comments regarding how CICS funds should be allocated between administration, technological research, public policy research, and educational programs. We agree with UC's revised proposal that the Governing Board of CICS ("Board") should ultimately determine the precise percentages of funds allocated between these areas. Indeed, the Board must have authority to appropriately allocate and modify funding on an ongoing basis. In our Comments submitted on November 2, 2007 (our "Comments"), we recommended an administrative budget of 12-15%, or \$7.2 to \$9 million per year, which is consistent with the model followed by other large grantmaking organizations in California. UC's revised proposal tentatively estimates an administrative budget of approximately 10%, or \$6 million per year. Several parties, including USC and CEC, perceive this estimate as being too

⁹ SCGC at 3.

high.¹⁰ For the following reasons, Morrison & Foerster believes that UC's estimated administrative budget is not excessive, but in fact conservative, and that CICS should be prepared to allocate 12-15% of its budget (\$7.2 to \$9 million yearly) to administrative costs.

USC recommends that CICS limit its administrative budget to only 5% of its total budget. USC appears to base this recommendation on the model of the National Science Foundation ("NSF"), which allocates only 5% of its budget to administration.¹¹ However, the size discrepancy between CICS and NSF limits the usefulness of any comparison between the two. NSF's annual budget in 2007 is \$5.92 billion, an amount exponentially larger than the \$60 million per year ear-marked for CICS.¹² Administrative costs for any organization include a number of fixed costs, which are more easily absorbed by NSF than they would be by a smaller entity like CICS. In 2006, NSF awarded over \$796 million in grants within California alone, with an estimated \$40 million in administrative costs in the state.¹³ Therefore, we anticipate that administrating CICS's California-wide grantmaking organization will require substantially more than 5% of its annual budget.

The Commission should also consider that CICS's administrative budget will facilitate not only the entire grantmaking process, but also ongoing and extensive monitoring of grant-funded projects. As noted by parties across the board, including Caltech, SCE, and DRA, effective progress monitoring will be crucial if CICS funding is to be put to its best use.¹⁴ Proper ongoing monitoring will help ensure that funds are not spent on projects that turn out to be unsuccessful, and that CICS funds projects that measurably contribute to the goal of reversing climate change. This monitoring will cost money that must be accounted for up-front if CICS is to operate within its stated budget. Further, funding will be required if CICS is successful in commercializing (through licenses, sales, spin-offs or other means) any of the research and development subject of the grant program. Therefore, Morrison & Foerster urges the Commission to approve a 12-15% administrative budget to allow CICS to successfully carry out its objectives.

¹⁰ USC at 4; CEC at 6.

¹¹ USC at 4.

¹² See http://www.nsf.gov/about/congress/110/highlights/cu07_0308.jsp#final.

¹³ See <http://dellweb.bfa.nsf.gov/AwdLst2/default.asp>.

¹⁴ Caltech at 3; SCE at 11; DRA at 4.

D. CICS Must Have Centralized Funding and Proper Organizational Structure.

Morrison & Foerster reiterates its support, expressed in our Comments, for centralizing the research and education programs within the proposed CICS. As noted, the problem of climate change is of such great magnitude that addressing it will require a concerted effort across disciplines. We note that some parties, particularly DRA and TURN, object to centralizing funding within CICS as proposed.¹⁵ While we understand these parties' concern on behalf of ratepayers, we urge the Commission to consider the long-term costs of not establishing CICS. Real solutions to climate change are long overdue, and failing to address the problem will ultimately lead to catastrophic impacts on human health and quality of life, as well as economic costs that will far surpass the proposed budget for CICS. Therefore, Morrison & Foerster continues to endorse UC's proposal to create CICS in partnership with the Commission.

In addition, Morrison & Foerster joins the participating educational institutions in supporting UC's revised vision of CICS as a consortium across educational institutions, rather than a body housed within the UC system.¹⁶ This will allow broad grantmaking and governance participation by all of the research institutions who become members or partners in CICS, while benefiting from the centralized pool of funds that CICS will manage.

In its OIR, the Commission noted that CICS must be properly structured so as to draw upon the resources of all of the various participating institutions. Morrison & Foerster wholeheartedly agrees that choosing the best organizational form for CICS is of paramount importance, because CICS will only be able to accomplish its objectives as planned if it embraces the appropriate organizational form. In our Comments, we suggested a number of different organizational formats that may be appropriate for CICS. CCST also submitted a specific recommendation that CICS take the form of a Joint Powers Authority, which was one of the options summarized in our Comments but may not be the most flexible as CICS pursues its ambitious mission.¹⁷

¹⁵ DRA at 2; TURN at 1-3.

¹⁶ UC at 3.

¹⁷ CCST at 4.

E. CICS Should Have a Research and Education Strategic Committee and Program Council, as Proposed by UC.

In response to UC's original proposal, some parties commented that there would be unnecessary overlap between the Steering and Stakeholder committees.¹⁸ Also, many of the educational institutions indicated that grantmaking decisions should be made with input from experts in various fields, rather than a generalized Steering Committee, so that grant funds would be put to the best possible use. Morrison & Foerster shared these concerns with respect to UC's original proposal, and now applauds the revised committee structure that UC has proposed.

The Research and Education Strategic Committee that UC proposes will introduce the subject-matter expertise needed at the committee level in order for the Board of CICS to identify and approve the most promising grant proposals and allocate appropriate funding awards, while the Program Council will facilitate implementation of the programs selected. This division of labor will enable CICS to integrate its research and administration components with minimal overlap. Additionally, Morrison & Foerster supports UC in proposing a peer-reviewed grant selection process, as suggested by Caltech and by our Comments. Such a process will ensure that crucial funding decisions are made with input from experts in the specific fields identified by CICS.

Finally, we agree with Stanford, Caltech and UC that in order for CICS to function collaboratively, no single entity should have a majority or near-majority on the Board, and therefore endorse UC's revised proposal to include members of the academic community from all participating institutions on the Board together with representatives of the public and private sectors as described in our Comments. Further, we recommend that decisions of the Board be made by a majority of a quorum present and not by consensus.

Conclusion

Pursuant to UC's revised proposal, CICS is one step closer to becoming a much-needed reality. Morrison & Foerster applauds the Commission for instituting this innovative approach to promoting research in this vitally needed area. We commend UC, the California State University System, Stanford, Caltech, USC and the California Community College System for working collaboratively to better define UC's original proposal. As previously noted in our Comments,

¹⁸ CEC at 2; Southern California Edison at 10.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document:

MORRISON & FOERSTER LLP'S RESPONSE TO COMMENTS

On all parties of record in the above captioned proceedings by serving an electronic copy on their email addresses of record, by U.S. Mail to the Assigned Commissioner and Administrative Law Judges and, for those parties without an email address of record, by mailing a properly addressed copy by first-class mail with postage prepaid to each party on the Commission's official service list for this proceeding as posted on the California Public Utilities Commission's website for proceeding R.07-09-008.

This Certificate of Service is executed on November 19, 2007, at Walnut Creek, California.

/s/ Kathy Beaudoin

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(November 19, 2007)**

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